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In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-259

BOSTON EDISON COMPANY,
APPELLANT,

v.

DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Motion to Dismiss

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Motion to Dismiss

The Department of Public Utilities of the Commonwealth of Massachusetts moves that the Court dismiss the appeal of Boston Edison Company for lack of a substantial federal question.

In support of its motion, the Department has filed a brief which sets forth the reasons why its motion should be granted.

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In the
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DEPARTMENT OF PUBLIC UTILITIES OF THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
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ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Brief in Support of Motion to Dismiss

Questions Presented

1. Does the Fourteenth Amendment to the United States Constitution require, in order to avoid confiscation of private property, that a public utility company whose rates and charges are regulated by the Massachusetts Department of Public Utilities be permitted a return on its common equity sufficient to maintain the market price of the company's stock at a level above the stock's book value?

2. Does the decision of Supreme Judicial Court deny the Boston Edison Company equal protection of the laws by its

determination, made on the particular record before the court, that the company's equity requirements were different from those of a telephone company in a separate, earlier case presented on a wholly different record?

3. Does the decision of the Supreme Judicial Court violate the Fourteenth Amendment in (1) determining, based on the court's independent review of the facts and law presented in the record, that the Boston Edison Company had not established its claim of confiscation and (2) thereafter proceeding to review the Company's alleged legal errors under the Massachusetts Administrative Procedure Act?

4. Does the Supreme Judicial Court's decision violate the due process clause of the Fourteenth Amendment by its refusal to award retroactive rate relief to make up for past losses, particularly where at the time of the court's decision Boston Edison Company's rates under appeal had been replaced by higher rates?

Statement of the Case

Boston Edison Company (Edison, or the Company) filed with the Massachusetts Department of Public Utilities (Department) an application for increases in its electric utility rates and charges on November 12, 1974. (App. 146.) It sought more than $70 million in increased revenues. (App. 147.) The Department docketed the application as D.P.U. 18200 and D.P.U. 18200A. After public hearings covering 43 days and on a record consisting of 6,000 pages of testimony and exhibits, the Department rendered a decision on September 30, 1975, within the statutory ten-month time period.[1] As amended, the Department's decision allowed the Company to increase its rates by $29,538,000. (App. 191.) The Company filed an appeal from the decision in the Supreme Judicial Court pursuant to Mass. Gen. Laws, c. 25, § 5, on October 17, 1975.

Also on October 17, 1975, Edison filed a new application for rate increases with the Department, totalling $49,500,000. (App. 79.) The Department docketed the application as D.P.U. 18515 and conducted 34 days of hearings on the Company's claimed revenue deficiency. It issued its decision on August 12, 1975, allowing Edison a $10,960,000 increase in retail electric rates. (App. 142.) The Company appealed again to the Supreme Judicial Court.

The Company's two appeals, together with three other appeals filed by intervenors in the two proceedings before the Department, were consolidated and reported for decision to the full bench of the Supreme Judicial Court in November, 1976. (App. 2.) After the submission of briefs and oral argument in April, 1977, the Supreme Judicial Court entered an interim stay of the Department's decision in May, 1977, permitting the Company to collect $6.619 million in additional revenues to cover increased property taxes. (App. 3.) The court rendered its decision in the case on April 19, 1978 (App. 2-53), and did not dissolve the interim stay. (App. 32.) The Company thereafter petitioned for rehearing. (App. 55-69.) Its petition was denied on June 22, 1978. (App. 70.)

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[1] Under Mass. Gen. Laws, c. 164, § 94, the Department was authorized to suspend an electric company's proposed increased rate schedules for ten months in order to conduct an investigation of the new rates. This statutory suspension period has subsequently been shortened to six months for proceedings commenced after January 1, 1977. Mass. Gen. Laws, c. 25, § 18, added by Mass. St. 1975, c. 684, § 90.

Statement of Facts

The proceedings before the Department which were the subject of the Supreme Judicial Court's opinion were long and complex, as their records attest.[2] It is neither possible nor necessary to summarize them here. Rather, certain salient facts that relate to the proceedings are described in order to place Edison's appeal to this Court in its proper perspective.

1. *History of relief*: Between 1972 and 1976, the Department granted Edison five separate rate increases, totalling approximately $100 million; the two increases granted in D.P.U. 18200 and D.P.U. 18515 were the fourth and fifth. Since 1976, the Company has requested and has been granted a sixth rate increase, totalling $23,290,000.[3]

2. *The Company's construction program*: The Company has pursued in the 1970's an extensive construction program, despite its demonstrated reduced growth in sales. As a result of recent and projected additions to plant, the Company in 1975 had a reserve capacity of over 51 per cent, although the then Federal Power Commission recommended a reserve capacity of only 20 to 22 per cent. In addition, the Company has projected substantial capacity reserves in almost every year through 1985.

One final fact about the Company's construction program should be noted. Edison's proposed new nuclear generating unit, Pilgrim 2 (see Jurisdictional Statement [J.S.] at 10), is presently not scheduled to go on line until June, 1985, at the earliest, by the Company's own calculations. Moreover, as a result of orders of the United States Nuclear Regulatory Commission, no construction work on this nuclear facility is presently taking place and it will not begin until the spring of 1979 at the earliest. Thus the Company's "necessary construction program" (J.S. at 12) has been substantially curtailed for the present, through the operation of events and forces wholly independent of the Department and the Supreme Judicial Court.

[2]The record in D.P.U. 18200 contains 44 volumes of transcript and numerous exhibits; the record in D.P.U. 18515 contains 35 volumes of transcripts and also a multitude of exhibits.

[3]*See* p. 5, *infra*.

3. *Financing the Company's construction program*: The Company submitted testimony in the Department proceedings that the reason it has needed constant and massive rate relief in the recent past is to permit financing of its construction program. As noted, this program has been reduced from that originally proposed, at least for the present time. Moreover, the record before the Supreme Judicial Court demonstrated that general improvements in market conditions since the time of the first Department proceeding (18200) had significantly improved the Company's financial status by 1976 and 1977. (App. 13 and n. 6.) For example, the price of its stock had risen from a low of $15 to $17 a share at the end of 1974 to $28.38 a share in 1977. (*Id.*)

4. *Further proceedings*: In 1977, while this case was pending before the Supreme Judicial Court, Edison applied for another rate increase to the Department. The proceeding was docketed as D.P.U. 19300, and on February 28, 1978, the Department rendered a decision in it allowing the Company to increase its retail rates by $23,290,000. The rate increases allowed were based on a test year from July 1, 1976, through June 30, 1977, obviously reflecting more recent data than the 1974 and 1975 test years used in D.P.U. 18200 and 18515, respectively. As the Supreme Judicial Court ruled in its opinion, the D.P.U. 19300 decision mooted out several of the issues in the case before it. (App. 3.) In March, 1978, Edison filed an appeal from the Department's D.P.U. 19300 decision. In June, 1978, the Supreme Judicial Court entered an interim

stay in that appeal, permitting the Company to collect an additional $5,582,000 in retail revenues. The stay was entered to allow recovery for increased property taxes and for taxes associated with Allowance for Funds Used During Construction, issues which the state court had decided in favor of the Company in the decision from which Boston Edison seeks to appeal to this Court. (*See* App. 32 and App. 33-40.)

Argument

I. Introduction: The Nature of This Case.

The decision of the Supreme Judicial Court from which Edison seeks to appeal is a thorough and considered resolution of the Company's challenges to the Department's rate determinations. The court's decision was rendered in conformity with the Massachusetts statute authorizing and governing judicial appeals by regulated utilities from orders of the Department, Mass. Gen. Laws, c. 25, § 5. Except for the length of the decision and the size of the records in the consolidated cases, nothing distinguishes this case from the many rate decisions the Supreme Judicial Court has rendered pursuant to that statute in appeals brought by other regulated public utilities in Massachusetts.

Although Edison asserts that in several respects the Supreme Judicial Court has violated its rights under the Fourteenth Amendment, even a cursory review of the state court's opinion belies the claim. On the issue of confiscation in particular, which lies at the heart of the Company's appeal here, the state court's consistent adherence to the ratemaking decisions of this Court is obvious. *See* App. 8-9, 10, 12, 14 and n. 7, 16, where the state court cited and relied upon the teachings of *Bluefield*

Water Works & Improvement Co. v. *Public Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 53 (1936); *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Market Street Ry. Co.* v. *Railroad Comm'n of California*, 324 U.S. 548, 567 (1945); *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968).

The standards which this Court has developed to review state ratemaking decisions are well established. The Court does not sit as a "board of revision," *Los Angeles Gas & Elec. Corp.* v. *Railroad Comm'n of California*, 289 U.S. 287, 304 (1933), to substitute its judgment on ratemaking issues for the state commission or indeed the state court. Rather, its function is solely to decide the constitutional question, namely, whether the rates fixed by the state, viewed as a whole, are confiscatory. "And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established." *Id.* at 305; *see id.* at 314.[4]

When the Supreme Judicial Court's decision and the Department's rate determinations are considered against these standards, their harmony with federal constitutional requirements is plain.[5] None of the arguments which the Company

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[4] *See also United Gas Pub. Serv. Co.* v. *Texas*, 303 U.S. 123, 142-143 (1938); *Railroad Comm'n of California* v. *Pacific Gas & Elec. Co.*, 302 U.S. 388 (1938); *West Ohio Gas Co.* v. *Public Utils. Comm'n of Ohio (No. 1)*, 294 U.S. 63, 70 (1935) (Court's inquiry in state rate cases limited to question whether action of state officials as a whole permitted the utility a return above the line of confiscation; if it did, due process is not violated by irregularity or error in the proceedings); *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U.S. 151, 175 (1934); *cf. Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602-603, 606-607 (1944), holding that under the Natural Gas Act, as well as under the Constitution, the Court's function is to decide whether the ratemaking order viewed in its entirety results in an unjust, unreasonable or confiscatory result.

[5] It is worth noting at the outset that the standards which the Supreme Judicial Court follows in reviewing a utility company's constitutional con-

makes in its Jurisdictional Statement raises a meritorious challenge to the state court's decision under the Fourteenth Amendment. They rather demonstrate that the Company seeks essentially to retry the facts of its rate case in yet another forum.[6] This Court's holdings long ago established that ". . . a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York* v. *United States*, 331 U.S. 284, 334-336 (1947); *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311 U.S. 570-576 (1941)." *Alabama Pub. Serv. Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341, 348-349 (1951).

The Court has not deemed it necessary to review a state court rate case in many years. As the arguments below demonstrate more fully, Boston Edison's appeal has not raised any federal questions of sufficient importance for the Court to exercise its powers of review in the present case. The Company's appeal to this Court should be dismissed.

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fiscation claim, standards it has adopted under the Massachusetts Constitution, *see Opinion of the Justices*, 328 Mass. 679, 685-687, 690 (1952), are probably more strict than those imposed by the United States Constitution. *Compare Opinion of the Justices, supra, with Federal Power Comm'n* v. *Hope Natural Gas Co., supra*, 320 U.S. at 603, 605-607; *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 790-792 (1968); *and Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-334 (1976) (court overstepped reviewing authority by accepting evidence from natural gas companies, and ordering commission to certify its accuracy and to conduct specified investigations; court's review should have been confined to commission record); *New York* v. *United States*, 331 U.S. 284, 334-336 (1947) (if additional evidence necessary on issue of confiscation, case should be remanded to commission). This point is further treated at p. 17, *infra*.

[6] *See* in particular Jurisdictional Statement, Argument III, at 23-26 and n. 13, where the Company asks this Court to review the dollar amounts of specific rate adjustments.

II. Edison's Attack on the Department's Cost of Equity Determination is in Plain Conflict with the Holdings of This Court and was Properly Rejected by the Supreme Judicial Court.

A. *The Company's Assertion of Confiscation Lacks Support in Law or Fact.*

Edison was dissatisfied with the Department's determination that a return on equity of 13 per cent would be fair and reasonable. Its attack on the Department amounts to a dispute over a question of judgment and implicates no constitutional issue. As this Court has held consistently, the choice of method to be used in setting a fair rate of return is the Department's to make, *see, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 806 (1968), and so long as its findings are reasonable and reflect "the exercise of a fair and enlightened judgment," they must be upheld. *Bluefield Water Works & Improvement Co.* v. *Public Serv. Comm'n of W. Va.*, 262 U.S. 679, 692 (1923). Of course, the lower end of the zone of reasonableness is the point at which the Department's judgment enters "the forbidden reaches of confiscation," *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 53 (1936), but the responsibility for proving confiscation belongs to Edison. It has failed to shoulder, much less carry, its burden.

The benchmarks of confiscation are inability to attract capital, lack of investor confidence, and threatened financial integrity. *See Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). Edison has shown nowhere in the record that it stands in jeopardy under any of these three measures. Its own experts presented testimony about the Company's cost of equity needs; other expert witnesses offered testimony with different analyses leading to lower cost of

equity determinations. As the Supreme Judicial Court pointed out:

> The Department did not base its decision on the testimony of any one witness. Rather, the Department's written decision evaluates the strengths and weaknesses of each witness' testimony, culling from the mass of evidence those elements which, we agree, are worthy of weight. (App. 10.)

This is not a process which suggests Departmental error. Nor can Edison fairly obtain one more round of review in this Court simply by asserting confiscation and thereby hoping to elicit a different judgment on the basis of the testimony from this Court than it was able to obtain from the other tribunals. *See Alabama Pub. Serv. Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341, 348-349 (1951).

Edison apparently recognizes its difficulty; it attempts to divert attention from its effort to immerse this Court in the mass of evidence on cost of equity by advancing a wholly novel theory of confiscation. It argues that the Department is obliged to set a cost of equity figure which will insure that the market price of its common stock remains above the stock's book value. The Company asserts that failure to guarantee a high profit on the sale of its stock constitutes confiscation. It offers not a single Supreme Court precedent to support such an obligation,[7] and for good reason. A requirement that a utility

[7] Edison's only direct citation is to a decision not of the United States Supreme Court but of the Supreme Judicial Court, *New England Tel. & Tel. Co.* v. *Department of Pub. Utils.*, Mass. Adv. Sh. (1976) 2246, 2259, 354 N.E. 2d 860, 867 (1976). This is a case which the state court found inapposite to Boston Edison, holding that the conditions requiring a market-to-book ratio of 1.2 to 1 in the case of the New England Telephone Company's

be insured a return sufficient to support its common stock price above book value would undermine the traditional relationship between state commissions, such as the Department, and regulated utilities. It is basic that the Constitution does not require rates that guarantee a profit to a utility. *E.g.*, *Federal Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U.S 575, 590 (1942). This rule clearly embraces the proposition that a utility is not entitled, as a matter of constitutional right, to rates which will maintain the stock price at or above its book value.[8] The only constitutional requirement in this area is that prudently invested capital be afforded an opportunity to earn a fair return on the investment. *Compare Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U.S. 581, 605 (1945), *with Smyth* v. *Ames*, 169 U.S. 466, 546-547 (1898).

Edison's proposed rule that a stock must trade at a premium above book is inconsistent with these governing principles. A

common stock were absent in Edison's case. (App. 15-16.) *See Fitchburg Gas & Elec. Light Co.* v. *Department of Pub. Utils.*, Mass. Adv. Sh. (1978) 1780, 1788, ____ N.E. 2d ____, ____ (1978), where the state court also declined to find that the appellant utility required a return on equity that would place its stock's market value above book value, again distinguishing *New England Tel. & Tel. Co., supra. See also Massachusetts Elec. Co.* v. *Department of Pub. Utils.*, Mass. Adv. Sh. (1978) 2443, 2461-2462, ____ N.E. 2d ____, ____ (1978). Any claim that the state court has applied its own precedents inconsistently raises no federal question and is therefore not subject to review in this Court. *E.g.*, *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 680 and n. 7 (1930).

[8] As the Supreme Judicial Court has noted:

> [T]he purchaser of stock knows that he has no guarantee that future rates will always support the price of the stock.
>
> It necessarily follows that there is no rule of law requiring the department to fix rates that will forever, or for some indefinite period of time, or for anytime, maintain the stock at the price for which it was required to be sold. *Cambridge Elec. Light Co.* v. *Department of Pub. Utils.*, 333 Mass. 536, 539-540 (1956).

market price lower than book price does not necessarily indicate a lack of opportunity to earn a fair return on the price of the investment. It is one of the many factors to be considered in the course of making a regulatory and economic judgment. As this Court has made clear, "[t]he due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces." *Market Street Ry. Co.* v. *Railroad Comm'n of California*, 324 U.S. 548, 567 (1945), quoted by the Supreme Judicial Court in its decision, App. at 16. Edison cannot shield itself from economic forces in the capital markets by an artificial *per se* rule. So long as financial integrity is maintained and capital offerings are competitive, there is no confiscation under the Fourteenth Amendment's due process clause.

Without any legal support for its proposition that, as matter of law, market price must trade above book value, the burden was squarely on Boston Edison to prove that its evidence compelled a cost of common equity figure above 13 per cent. This it failed to do. The Supreme Judicial Court combed the record, summarized the testimony in its opinion and showed that the Company's financial integrity remained intact. Further review of this record is therefore unwarranted.

B. *Edison's Equal Protection Argument is Patently Without Merit.*

Edison tries to shore up its confiscation argument by claiming discrimination in the Supreme Judicial Court's treatment of Massachusetts utilities. It states that the court is guilty of unfair and discriminatory treatment when it reviews a utility company's common equity requirements with an eye on the nature of the company's capital needs. No distinctions can

constitutionally be made, in Edison's view, between different kinds of construction programs in assessing how much capital a company will need to attract and over how long a period.

Edison's claim has no merit. It is a self-serving effort designed to diminish the range of inquiry a public utilities commission may undertake in making the difficult judgments underlying cost of equity requirements, and is directly contrary to this Court's ratemaking holdings which emphasize the need for flexibility and good judgment. *See, e.g., Bluefield Water Works & Improvement Co.* v. *Public Serv. Comm'n of W. Va., supra*, 262 U.S. at 692.[9] Furthermore, in the area of local economic regulation, under which state ratemaking decisions concededly fall, an essentially factual determination that one utility's equity needs are different from another's simply does not and cannot constitute a denial of equal protection. *New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976).[10]

Finally, Edison's attempt to avoid this Court's rule of deference toward state economic judgments by trying to erect a distinction between state legislative and judicial determinations is specious. The Supreme Judicial Court's decision under challenge here affirmed the Department's determination on the cost of equity issue. (App. 9-10, 16.) Thus Edison's real complaint is with the underlying Departmental decision, and

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[9] *See also Railroad Comm'n of Texas* v. *Rowan & Nichols Oil Co.*, 311 U.S. 570, 575-577 (1941); *Los Angeles Gas & Elec. Corp.* v. *Railroad Comm'n of California*, 289 U.S 287, 305, 314 (1933); *Georgia Ry. & Power Co.* v. *Railroad Comm'n of Georgia*, 262 U.S. 625, 634 (1923); *cf. Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602-603 (1944); *cf. also New York* v. *United States*, 331 U.S. 284, 335-336 (1947).

[10] It is not unique for a utility to attempt to turn an unfavorable rate decision into a claim of discrimination. The claim is often included as part of a company's appellate boilerplate. The Supreme Judicial Court has recently disposed of one such claim quite similar to that raised here by Edison. *Massachusetts Elec. Co.* v. *Department of Pub. Utils.*, Mass. Adv. Sh. (1978) 2443, 2465-2467, ___ N.E. 2d ___, ___ (1978).

the Department, as Edison acknowledges, operates as the Legislature's surrogate in ratemaking matters. (J.S. at 18.) Despite the Company's contrary arguments, therefore, the traditional policy of respect which is due to legislative judgments on questions of economic regulation should be given full accord in this case.[11] That rule defeats Edison's equal protection claim, and it is unnecessary to review the claim further.

III. The Supreme Judicial Court's Treatment of Edison's Two Confiscation Arguments Satisfied the Requirements of the Fourteenth Amendment.

Edison argues that the state court failed to give its claim of confiscation an independent review of both law and fact, thereby depriving it of property without due process. (J.S., Arguments II and III, at 19-26.) The arguments are based on a misreading of the state court's decision and are in any event without merit.

The decisions of this Court have identified certain indicia of confiscation of a utility company's property through the exercise of state or federal rate regulation: whether the return received by the equity owners of the utility will be comparable to returns received on investments in similar enterprises, will be sufficient to assure confidence in the financial integrity of the utility, and will attract necessary capital to the company. *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968); *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, 605 (1944); *Bluefield Water Works & Improvement Co.* v. *Public Serv. Comm'n of W. Va.*, 262 U.S. 679, 692 (1923). (*See* Argument II at 9, *supra*.)

[11] Moreover, the ratemaking decisions of this Court provide no support whatsoever for Edison's suggestion that different standards govern judicial review of rate determinations of state courts as opposed to those of state utilities commissions. *See, e.g., Railroad Comm'n of California* v. *Pacific Gas & Elec. Co.*, 302 U.S. 388, 394-395 (1938); *West Ohio Gas Co.* v. *Public Utils. Comm'n of Ohio (No. 1)*, 294 U.S. 63, 70 (1935).

As previously indicated, the state court in its decision examined the record carefully to see whether the overall rate of return allowed to Edison satisfied the tests of reasonable compensation as defined by the indicia of confiscation set forth above. (App. 8-16.) In so doing, the court explicitly stated that it was giving "independent review as to both law and fact" concerning the Company's allegation of confiscation. (App. 8.) It ultimately concluded on the facts and law presented, however, that the 13 per cent cost of equity figure — the only portion of the composite 9.49 per cent rate of return challenged by the Company — was "above the line of confiscation." (App. 16.)

This ultimate finding by the state court directly contradicts Edison's assertions that the Company "proved" and "established" confiscation of its owners' property in the proceedings below. (J.S. at 22.) More important, the finding also disposes of the Company's argument about the scope of review to which it was entitled. The Supreme Judicial Court did give independent review to all the facts and law contained in the record which related to the established criteria of confiscation. While it recognized that Edison had raised two confiscation theories, the second of which covered certain cost of service and rate base adjustments (App. 7-8), the court's factual finding that confiscation had not been proved rendered it unnecessary to deal with the legal merits of Edison's second theory.[12]

[12] The state court clearly did not confuse "the distinction between the *allowed* return on equity and the return *actually earned* by the Company." Jurisdictional Statement at 22 (emphasis in original). The short answer to Edison's argument is that a utility company's failure to earn its allowed rate

The Fourteenth Amendment has never been held to require that a court, after finding that a utility has failed to sustain its burden on a confiscation claim when measured by the recognized standards, must accord "independent" review to separate claims about individual rate base and cost of service adjustments. Indeed, the more recent cases of this Court strongly suggest that the Fourteenth Amendment does not even mandate this type of "independent" judicial review of any confiscation claim; the overall impact and result of a rate determination alone are constitutionally significant, not the theory on which the rate was calculated. *See Permian Basin Area Rate Cases, supra*, 390 U.S. at 770-776; *Federal Power Comm'n* v. *Hope Natural Gas Co., supra*, 320 U.S. at 602; *see also Los Angeles Gas & Elec. Corp.* v. *Railroad Comm'n of California*, 289 U.S. 287, 314 (1933).

In sum, Edison simply failed to establish, on the factual record it presented below, confiscation of its property under either the state or federal Constitution. Its attempt to sidestep this basic lack of proof by misreading the state court's opinion and erroneously attacking the standard of judicial review employed do not raise federal questions worthy of the Court's review.

Boston Edison's related claim about the Mystic 7 revenue adjustment (J.S. Argument III) is even less deserving of consideration by this Court. Edison argues that the Supreme Judicial Court was constitutionally required to allow the Company $5,582,000 in additional revenues for Mystic 7, based on evidence submitted to that court after the Department had rendered its decision. (J.S. at 24-26.) In making the assertion, however, Edison has not cited to one decision of this Court, relying solely on decisions of the state court. While this reliance itself is misplaced as a matter of state law, Edison's federal claim fails in any event because the Fourteenth Amendment did not impose a duty on the Supreme Judicial Court to order the proposed Mystic 7 adjustment.

of return does not without more amount to confiscation. *See Market Street Ry. Co.* v. *Railroad Comm'n of California*, 324 U.S. 548, 567 (1945); *see also Massachusetts Elec. Co.* v. *Department of Pub. Utils.*, Mass. Adv. Sh. (1978) 2443, 2463-2464, ___ N.E. 2d ___, ___ (1978); *Fitchburg Gas & Elec. Light Co.* v. *Department of Pub. Utils.*, Mass. Adv. Sh. (1978) 1780, 1788, ___ N.E. 2d ___, ___ (1978); *Boston Gas Co.* v. *Department of Pub. Utils.*, 368 Mass. 780, 791 (1975). Edison made no showing that its inability to make its allowed rate of return resulted from the Department's action. *See* App. 16.

It is well established that in reviewing a utilities commission's decision on the commission's record, a court has no absolute federal constitutional obligation to accept and be guided by new evidence proffered as part of the appeal. In all but the most unusual cases, the rule is the opposite; this Court has repeatedly cautioned that judicial review of administrative rate decisions is to be confined to the record before the agency. *See Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-334 (1976); *New York* v. *United States*, 331 U.S. 284, 334-336 (1947); *cf. Interstate Commerce Comm'n* v. *Jersey City*, 322 U.S. 503, 514-516 (1944).[13] The Company's contrary suggestions border on the frivolous and should be dismissed.

[13] *See* pp. 7-8, n. 5, *supra*.

IV. Edison's Claim for Rate Relief to Recover for Losses it Sustained in the Past Finds No Support in the Fourteenth Amendment as Construed by This Court.

The Company's final argument relates to the revenue losses it claims to have sustained as a result of (1) the lengthy rate proceedings before the Department and the time taken by the Supreme Judicial Court to reach its decision, and (2) that court's refusal to award higher rates to correct for the Department's errors. (J.S., Argument IV, at 26-31.) In Edison's view, the Fourteenth Amendment requires that it be compensated for past losses through the imposition of what would essentially be surcharges on future rates. The Court's decisions, however, clearly defeat the Company's claim. No substantial federal question is presented, as is detailed below.

1. Edison's claim for "appropropriate rate relief" (J.S. at 31) relating to alleged delays in the administrative and judicial proceedings below is nothing more than an attempt to charge its present and future retail customers rates that will recoup for losses suffered in the past. The Court long ago ruled that utility rates determined by a state (or federal) regulatory commission, being legislative in character,[14] operate prospectively and cannot be used to make up for past losses which the utility has suffered, regardless of their cause. *Galveston Elec. Co.* v. *Galveston*, 258 U.S. 388, 395 (1922); *Georgia Ry. & Power Co.* v. *Railroad Comm'n of Georgia*, 262 U.S. 625, 632 (1923); *Board of Pub. Utils. Comm'rs* v. *New York Tel. Co.*, 271 U.S. 23, 31 (1926); *Arizona Grocery* v. *Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 386-387 and n. 16 (1932); *Federal Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942);[15] *cf. Board of Pub. Utils. Comm'rs* v. *New York Tel. Co.*, *supra*, 271 U.S. at 32 (public utility may not be required to give up past profits for the benefit of present customers to sustain present rates at levels otherwise confiscatory.) This rule seems to apply *a fortiori* where, as here, the Company's challenged rates have already been superseded by higher rates and charges, determined by the Department on the basis of the Company's more recent financial data and experience. See p. 5, *supra*.

In addition, the Court has indicated that no constitutional issues are raised under a federal regulatory system which precludes a utility from recouping losses it might have suffered pending the regulatory agency's investigatory suspension of its proposed rate increases. *Federal Power Comm'n* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-153 (1962). No relevant distinction exists between the statutory rate suspension scheme under which the Department acted in the proceedings below and the suspension provisions of the Natural Gas Act at issue in the cited case. That decision governs here.

2. Edison's assertion of confiscation by alleged administrative and judicial delay or otherwise finds no factual support in the record. The Supreme Judicial Court held that the Department's proceedings were conducted within the statutory time periods, and that the record presented did "not support the Company's assertion that the delay was inordinate or intentional." (App. 52.) It also held, as indicated above, that the Company had not sustained its burden of proving confiscation in the 18515 proceeding. (App. 8, 16.) Finally, the state court never ruled on the Company's confiscation claims in

[14] The Company itself concedes the legislative nature of rate decisions in seeking to bring the present case before the Court by direct appeal rather than by petition for a writ of certiorari. (J.S. at 2-3.) *See* 28 U.S.C. § 1257(2).

[15] *Accord, Payne* v. *Washington Metro. Area Transit Comm'n*, 415 F. 2d 901, 910-911 (D.C. Cir. 1968); *Democratic Central Comm. of D.C.* v. *Washington Metro. Area Transit Comm'n*, 436 F. 2d 233, 236 (D.C. Cir. 1970); *New England Tel. & Tel. Co.* v. *Public Utils. Comm'n*, 116 R.I. 356, 358 A. 2d 1, 19-20 (1976).

18200 because the Company did not pursue its appeal of the rate level issues in that case. Absent a factual basis to support its confiscation claims, Edison's legal theories about constitutionally required remedies certainly do not raise a substantial question for this Court's consideration.

3. Assuming, *arguendo*, that Edison was forced to operate under confiscatory rate levels during the life of the Department's proceedings appealed to the Supreme Judicial Court, the Company has available to it an adequate remedy under state law to protect against the taking of its property. In a decision rendered in June, 1975, the Supreme Judicial Court made clear that a utility company which believed the Department's ongoing rate proceedings were operating to deprive it of procedural or substantive due process could seek immediate judicial relief. *Boston Gas Co.* v. *Department of Pub. Utils.*, 368 Mass. 51 (1975). Edison declined to avail itself of this mode of relief at any time during the D.P.U. 18200 or D.P.U. 18515 proceedings. The availability of the remedy, however, defeats its present claim that the Massachusetts regulatory system, considered *in toto*, deprives it of due process rights guaranteed by the Fourteenth Amendment.

4. The cases on which the Company relies (J.S. at 29-30) are of no real assistance to its claim for retroactive rate relief. For the most part these cases deal with statutory systems very different from Massachusetts', and were decided solely on statutory grounds,[16] or involved very different circumstances.[17]

[16] *See, e.g., United States* v. *New York Central R.R. Co.*, 279 U.S. 73 (1929); *Pennichuck Water Works* v. *New Hampshire*, 103 N.H. 49, 164 A. 2d 669 (1960); *In re New England Tel. & Tel. Co.*, 131 Vt. 310, 305 A. 2d 598 (1973); *see also United States* v. *Civil Aeronautics Board*, 510 F. 2d 769, 775 (D.C. Cir. 1975). These cases are cited at pp. 29-30 of the Jurisdictional Statement.

[17] *See, e.g., United States* v. *New York Central R.R. Co., supra* (construing federal statute governing railroads' obligation to carry mails and United States' obligation to compensate for service; individual railroad customers not involved); *Chesapeake & Potomac Tel. Co.* v. *Public Serv. Comm'n*, 330 A. 2d 236 (D.C. Ct. App. 1974) (upholding Commission's grant and deferral of interim rate level increase until rate structure determined in second phase of rate proceeding).

The sole decision which provides arguable support, *Potomac Elec. Power Co.* v. *Public Serv. Comm'n*, 380 A. 2d 126 (D.C. Ct. App. 1977), *rehearing en banc granted* (March 2, 1978), involved a case where the municipal court found the Commission's rate order to be confiscatory. The Supreme Judicial Court made no such finding in this case.

Conclusion

For the reasons stated above, this Court should dismiss Boston Edison Company's appeal. If the Court considers the Company's appeal as a petition for a writ of certiorari, the Court should deny the petition.

Respectfully submitted,

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